

## 7. MISCELLANEOUS CONTRACTING ISSUES

### 7.00• INTRODUCTION

This chapter covers miscellaneous contracting issues that arise in various types of contracts.

### 7.01• TABLE OF CONTENTS (Rev 10/05)

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## 7.05 • CIVIL SERVICE CONSIDERATIONS

(Rev 3/03)

A. Basic considerations are as follows:

1. Contracting for Personal Services, in lieu of using civil service personnel is permitted only if the standards outlined in GC § 19130 (a) or (b) are met. See 2 and 3 below.
2. Section 19130(a) permits contracting for personal services to achieve cost savings. Any state agency proposing to execute a contract based on cost savings to the state as justification for not using civil service personnel, must first notify the State Personnel Board of its intention. (GC § 19130(a)). Section 547.71 of the SPB regulations provide that the cost savings achieved shall be either 10% or more of the civil service costs of performance or shall be \$50,000 in 1988 dollars and at least 5% of the civil service cost of performance. The 1988 dollar equivalent for the calendar year 2002 is at least \$75,000.
3. Section 19130(b) permits contracting for personal services when any of the requirements of 19130(b) are met. See also SPB Regulations 2 CCR § 547.60
4. Departments or agencies submitting a proposed contract to DGS for approval must retain all data and information relevant to the contract and necessary for a specific application of the standards set forth in GC § 19130(a) in the event that the State Personnel Board's review is requested. For standards of review see PCC § 10337.
5. GC § 19130(c) requires that all persons who provide services to the state under conditions that constitute an employment relationship shall, unless exempted by Article VII (Section 4) of the California Constitution, be retained under an appropriate civil service appointment. Therefore, state law and policy require that each state agency's contract for services with individuals be executed and administered in a manner consistent with the establishment of an independent contractor status when a civil service appointment is not intended.

B. Contracts awarded on the basis of GC § 19130(b) are subject to review at the request of an employee organization representing state employees. For standards of review see PCC § 10337.

C. Contracting out for services is permissible when any of the conditions set out in GC § 19130(b) can be met.

D. SPB regulations require agencies, when submitting contracts let under GC § 19130(b) for DGS approval, to attach a written justification that includes specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in GC § 19130 (b). (See [www.spb.ca.gov](http://www.spb.ca.gov)).

## 7.10 • CONFLICTS OF INTEREST (7.10 entirely replaced as of 9/01)

(Rev 9/01)

A. IS THERE A CONFLICT OF INTEREST? The phrase "conflicts of interest" covers several subjects. It requires state agencies to take a close look at who is doing the work under the contract. Agencies should develop a plan to review conflict of interest issues.

IS OR WAS THE CONTRACTOR A STATE EMPLOYEE? State agencies need to determine whether the contractor is or was a former or current state employee who is prohibited from contracting under the PCC 10410 – 10411 or GC 87401 et seq.

**(7.10 A. Conflicts of Interest (7.10 entirely replaced as of 9/01) – continued)**

1. **CONSULTANT CONTRACTS:** State agencies must determine whether a consultant's proposed duties create any reporting requirements under the Political Reform Act. Under some circumstances, consultants may be required to report economic interests; may be prohibited from receiving gifts; and/or may be disqualified from participating in certain decisions. Covered consultants may include:
  - a. Individuals performing services acting as a consultant with authority to
    - Approve a rate, rule or regulation.
    - Adopt or enforce a law.
    - Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement
    - Authorize your agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval
    - Either grant agency approval to a contract that requires your agency's approval and to which your agency is a party; or grant approval to the specifications for such a contract
    - Grant agency approval to a plan, design, report, study, or similar item
    - Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision of the agency
  - b. Individuals who serve, under contract, in a staff capacity with the agency and in that capacity participate in making a governmental decision as defined in 2 CCR 18702.2.
  - c. Individuals who perform the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code under Government Code Section 87302.
2. **IS THERE A PROHIBITED FINANCIAL INTEREST PRESENT?** Employees and certain consultants may be prohibited from participating in decisions or participating in "making contracts" if they have a financial interest. See GC 1090 et seq. and GC 87400 et seq.
3. **IS THERE A FOLLOW-ON CONTRACT INVOLVED?** Consultants are prohibited from bidding on, or being awarded a contract that is required, suggested, or otherwise deemed appropriate in the end product of a previous consulting contract with them. See PCC 10365.5 to determine applicability.

**B. RESOURCES**

- 1 Fair Political Practices Commission: see [www.fppc.ca.gov](http://www.fppc.ca.gov)
2. Examine your department's Conflict of Interest Code to determine the reporting requirements for covered consultants.
3. Ethics Training: On line training (DOJ: see [www.caag.state.ca.us/consultants/index.htm](http://www.caag.state.ca.us/consultants/index.htm) and [www.caag.state.ca.us/ethics/ethifram.htm](http://www.caag.state.ca.us/ethics/ethifram.htm)) or live classes (DGS) are available.
4. Your departmental legal office.

**C. AGENCY RESPONSIBILITY**

1. Agencies/departments must indicate on the Std. 215 that they have evaluated the proposed contract for any potential conflict of interest issues.

**(7.10 C. Conflicts of Interest (7.10 entirely replaced as of 9/01) – continued)**

2. It will be presumed that an affirmative (“Yes”) indication means that the department has made a determination that there are no facts known or reasonably known that would disqualify the proposed contractor from legally performing the contract.
3. DGS reserves the right to conduct an independent review for conflicts of interest during the course of its standard contract review. However, this does not relieve agencies from performing their review per B.2. above.

**7.15 • REPORTING OF CONTRACTING PRACTICES****(Rev 3/03)**

Legislation requires contracting agencies to submit various reports on contracting practices, as follows:

- A. Fair Employment and Housing (Within Ten Days of Award Date)
  1. Under 2 CCR § 8117.5, agencies awarding contracts are required to notify the Department of Fair Employment and Housing (DFEH), Office of Compliance Programs, of any contract awarded in excess of \$5,000. Departments are required to submit one form STD 16 to the Office of Compliance Programs for each contract in excess of \$5,000 within ten days of the award date. Under some circumstances it may be possible to make other arrangements with DFEH.
- B. Small Business Report (Annually on September 7th)
  1. The Small Business Procurement and Contract Act (SBPCA), GC § 14835, provides that a fair share of state purchases and contracts or subcontracts for property and services be placed with small business enterprises.
  2. The evaluation and progress of this policy guideline is monitored through the annual reporting by all state departments on the Contracting Activity Report form STD 810, by September 7th of each year. These reports are filed with DGS/PD Small Business & DVBE Outreach and Education Section (for information regarding this report contact the report coordinator at (916) 375-4400).
- C. Consultant Report (Annually by September 24)
  1. PCC § 10359 requires state agencies to report their Consulting Services Contract activity for the preceding fiscal year to DGS and the six legislative committees and individuals that are listed on the annual memorandum from DGS. Departments are required to report their fiscal year contract data within 60 working days [September 24] of the end of the fiscal year. The PCC also requires DGS to report to the Legislature a list of departments and agencies that have not submitted the required report.
  2. PCC § 10369 requires state agencies to prepare post evaluations on form STD 4 for all completed consulting services contracts of more than \$5,000 or more. Copies of negative evaluations must be sent to DGS/OLS. In addition, the Bureau of State Audits requires agencies annually to certify compliance with these requirements.

**(7.15 Reporting of Contracting Practices – continued)****D. DVBE, Minority and Women Reporting**

Statute	GC 11139.8 (SB 1045)	M&V 999.7	PCC 10115.5	PCC 10116 (AB 1084)
Report Due Date	On or before July 1 each year	1. State agency reports due Jan. 1st each year 2. DGS statewide report due April 1 each year	January 1 of each year	January 1 of each year
Report Period	Not specified in the law	Previous fiscal year	Previous fiscal year	Previous fiscal year
Who Reports	Each state department or agency	1. Each awarding department 2. DGS compiles statewide report	Each awarding department	Each awarding department
Who are reports sent to?	Governor, Legislature	Governor, Legislature, DGS, CDVA	Governor and Legislature	Governor and Legislature
What is to be reported?	Level of participation by minority, women and DVBEs	Level of participation by DVBEs	Levels of participation by minority, women and DVBEs	Level of participation by race, ethnicity and gender of owner
Categories to be reported	1. Construction 2. Architecture, engineering and other professional services 3. Procurement of materials, supplies and equipment 4. Information technology	Professional bond services, contracts for construction, professional services, materials, supplies, equipment, alterations, repairs or improvement	1. Construction 2. Purchases of materials, supplies, and equipment 3. Professional services 4. All contracts for a dollar amount of less than twenty-five thousand dollars (\$25,000)	1. Construction 2. Purchases of materials, supplies, or equipment 3. Professional services 4. All contracts for a dollar amount of less than twenty-five thousand dollars (\$25,000)

**7.20 • PROMPT PAYMENT****(Rev 10/05)**

- A. Prompt Payment Act and interest penalty fee. Under GC § 927 et seq. state agencies which acquire property or services pursuant to a contract with a business must pay that business for each complete delivered item of property or services within 45 days from the date set forth in the contract or, if no payment date is specified in the contract, submit a correct claim schedule to the SCO within 30 calendar days after receipt of the undisputed invoice. The state agency must forward the invoice for payment to the State Controller's Office (SCO) within 30 calendar days after receipt of the undisputed invoice. The SCO must pay the business within 15 days of receipt of the invoice from the state agency. The clock starts to run when an invoice is received by the department, not when it is received by the accounting office. The OLS will not approve any contracts with payment periods longer than 45 days (Management Memo 99-11).

**(7.20 A. Prompt Payment – continued)**

If payment is not made within the times specified above, an interest penalty fee at a rate of one percent above the Pooled Money Investment Account earning rate for the previous year must be paid. For non-small businesses, the penalty is waived if the penalty is \$75.00 or less. (See GC § 927.6 and SAM § 8475)

- B. Small business prompt payment. Additional provisions apply for certified small businesses. (See GC § 927.6(a) and SCM 8.23)

**7.21 • INDEPENDENT CONTRACTORS**

(Rev 3/03)

To assist state agencies in properly classifying individuals performing services, the Employment Development Department has prepared an Internet article that explains the differences between an independent contractor and an employee. This article supercedes Management Memo 95-18 and can be found at: <http://www.edd.ca.gov/ee-ic.pdf>

**7.25 • CONTRACTOR IDENTIFICATION NUMBERS**

(Rev 10/05)

- A. Each contractor who enters into a contract with the state must provide a taxpayer identification number; i.e., the federal employer identification number or the Social Security Number that has been assigned to the contractor by the federal government. Each contractor must include the taxpayer identification number on all subsequent contracts with the state regardless of the contract amount. A Taxpayer ID number is not required for a reimbursement contract.
- B. Contracting state agencies must obtain the taxpayer identification number from the contractor. The following documents must contain this information:
1. Payee Data Record - STD 204, which is to be retained in the awarding agency's accounting or business services office (if applicable)
  2. State Contract Transmittal - STD 15 or STD 215
  3. Standard Agreement - STD 2 or STD 213
  4. Contract/Contractor Evaluation - STD 4
  5. Contract Award Report - STD 16
- C. The law requires that any agency requesting the disclosure of a social security number must advise the provider as follows:
1. Whether disclosure is mandatory or voluntary
  2. By what statutory authority the number is solicited
  3. The intended use of the number

**7.29 • EQUIPMENT PURCHASES**

(Rev 3/03)

- A. When equipment is purchased or built with state funds as part of the contract the contract must clearly state that title to any equipment purchased or built with state funds will vest in the state. On termination of the contract, the state may:
1. Request such equipment be returned to the state, with costs incurred by the contractor for such return being reimbursed by the state.

**(7.29 A. Equipment Purchases – continued)**

2. Authorize the continued use of such equipment for work to be performed under a different agreement or contract.
- B. The state may, at its opinion, repair any damage or replace any lost or stolen items and deduct the cost thereof from the contractor's invoice to the state, or require the contractor to repair or replace any damaged, lost, or stolen equipment to the satisfaction of the state with no expense to the state. In the event of theft, a police report must be filed immediately. (Refer to SAM § 2625)
- C. The contractor should maintain an inventory record for each piece of non-expendable equipment purchased or built with funds provided under the terms of a contract. The inventory record of each piece of such equipment should include the date acquired, total cost, serial number, model identification (on purchased equipment), and any other information or description necessary to identify said equipment. Non-expendable equipment so inventoried are those items of equipment that have a normal life expectancy of one year or more and an approximate unit price of \$5,000 or more. In addition, theft-sensitive items of equipment costing less than \$5,000 should be inventoried. A copy of the inventory record must be submitted to the state on request by the state. (Refer to SAM Section 8600)
- D. Procedures for the handling and accounting of equipment through contracts is the same as that for handling through regular state purchasing.

**7.30 • CONTRACT BUDGETS****(3/03)**

- A. If payment is on a cost reimbursement basis, the following items should be included and all unit rates must be extended and totaled (PCC § 10371[C]):
  1. Personal service costs showing individual or position rates per unit of time
  2. Fringe benefits costs citing actual benefits or a percentage of personal services costs
  3. Operating expenses including rent and supplies
  4. Equipment costs specifying equipment to be bought and the disposition of equipment at the end of the contract
  5. Travel expenses and per diem rates set at the rate specified by the Department of Personnel Administration for similar employees or verification supplied that such rates are not available to the contractor
  6. Overhead
  7. Other specific breakdown required
- B. A consultant services contract must contain the above items. (PCC § 10371(c))
- C. If payment is based on a lump sum or fixed price for the total project, the contractor is paid for an agreed upon result.

**7.31 • AVAILABILITY OF FUNDS****(Rev 3/03)**

- A. If the contract funding spans more than one fiscal year's appropriation, the contractor must be advised in writing as follows:

This contract is valid and enforceable only if sufficient funds are made available by the Budget Act of the appropriate fiscal year for the purposes of this program. In addition, this

**(7.31 A. Availability of Funds – continued)**

contract is subject to any additional restriction, limitations or conditions enacted by the Legislature, which may affect the provisions, terms, or funding of this contract in any manner.

- B. Services should be paid for out of the funding for the fiscal year during which they are rendered.

**7.32 • ADVANCE PAYMENTS**

Advance payments by the state are permitted only when specifically authorized by statute and should be made only when necessary. Contracts or agreements containing provisions for advance payments by the state should preferably provide for small periodic payments rather than the total contract price or lump-sum advances (GC §§ 11256 – 11263, 11019 and 12425).

**7.33 • PROGRESS PAYMENTS**

(Rev 3/03)

- A. A progress payment is a partial payment for a portion or segment of the work needed to complete a task.
- B. Not less than ten percent (10%) of the contract amount shall be withheld pending final completion of the contract. If a contract consists of the performance of separate and distinct tasks, then any funds withheld for a particular task may be paid upon completion of that task (PCC § 10346).

Note: Separate and distinct tasks do not usually occur when the contract is for a finished project report or plan. To determine whether a particular task is separate and distinct you must decide if later tasks build on it. For example, if the contract requires the writing of a manual the completion of each chapter is not a separate and distinct task. The ten percent (10%) withhold should not be paid until the manual is completed satisfactorily.

- C. No state agency shall make progress payments on a contract unless it first has established procedures approved by DGS/OLS, to ensure that the work or services contracted are being delivered in accordance with the contract (PCC § 10346).
- D. Recommended policy for state agencies:
  - 1. Discourage progress payments whenever possible.
  - 2. Do not allow progress payments on contracts of less than three months.
  - 3. If progress payments are to be made, they should be made not more frequently than monthly in arrears or at clearly identifiable stages of progress, based upon written progress reports submitted with the contractor's invoices.
  - 4. Progress payments should be based on at least equivalent services rendered. (Hours worked should not be the sole basis for progress payments.)
  - 5. Progress payments shall not be made in advance of services rendered
  - 6. Contracts shall require a withhold of ten percent (10%) of each progress payment either pending satisfactory completion of the contract or completion of a separate and distinct task.

Note: If the contract is competitively bid this term should be noted in the bid document.



**(7.33 D. Progress Payments – continued)**

7. Establish a procedure to indicate the amount to be withheld on invoices.
8. Establish a procedure to obtain the amounts withheld.

## **7.34 • CONTRACT PAYMENT BY STATE PURCHASE CARD, CAL-CARD**

**(Replaced 10/05)**

Cal-Card is a payment mechanism only. It shall not be used to circumvent services contracting rules.

If you intend to use Cal-Card as a payment mechanism, place this information in your solicitation document and contract.

CAL-Card Payment Provisions are required to follow this basic format:

*“CAL-Card PAYMENT PROVISIONS:*

*Upon receipt of an itemized invoice, in arrears, stating the goods/services provided, time period covered, detailed costs and the contract number, the Contract Manager will notify the Contractor of payment authorization. The Contractor will provide the Contract Manager a copy of the itemized, transaction receipt showing payment was received, the invoice, the contract number and the CAL-Card card verification number charged. Contractor to send invoices to:*

*Name, mailing address and phone number of the Contract Manager/Cardholder.*

*Name, mailing address and phone number of Contractor payment authorization contact.”*

Questions regarding the CAL-Card Program may be directed to the Statewide CAL-Card Administrator, Department of General Services, Procurement Division, 707 Third Street, 2nd Floor, West Sacramento, CA 95798-9052, Telephone (916) 375-**4578**

## **7.40 • INSURANCE REQUIREMENTS**

**(Rev 10/05)**

- A. ~~Evidence of insurance shall meet the requirements specified in the contract and shall be of a form and content acceptable to DGS/ORIM and will be presented to DGS/OLS with the contract when it is submitted for approval. Insurance for hazardous activities shall meet the following requirements:~~ **For most types of services contracts, departments retain responsibility for assessing the need for and amount of insurance, obtaining proof of insurance, and including appropriate solicitation and contract language as applicable.**

**B. Contracts for hazardous activities are required to have insurance. (See SCM 3.12)**  
**Insurance for hazardous activities shall meet the following requirements:**

1. The insurance must be issued by an insurance company acceptable to DGS/ORIM or be provided through partial or total self-insurance acceptable to DGS.

~~The certificate of insurance shall state a limit of liability of not less than \$1,000,000 per occurrence for bodily injury and property damage liability combined.~~

2. **The contractor must furnish to the State a certificate of insurance showing that a limit of liability of not less than \$1,000,000 per occurrence for bodily injury and property damage liability combined, is presently in affect for the contractor**

Note: \$1,000,000 per occurrence is the minimum acceptable limit of insurance; higher limits should be required in cases of higher-than-usual risks.

**(7.40 B. Insurance Requirements – continued)**

- ~~23.~~ The certificate of insurance shall show that hazardous activities are protected through commercial general liability insurance. Additional insurance, such as automobile liability insurance, may be required if motor vehicles are used in the performance of the contract.
- 4. The certificate of insurance must provide that the insurer will not cancel the insured's coverage without 30 days prior written notice to the State; and**
- 5. The certificate of insurance must provide that the State of California, its officers, agents, employees, and servants are included as additional insured, but only with respect to work performed for the State of California under the contract.**
- ~~36.~~ The certificate of insurance shall meet such additional standards as may be determined by the contracting state agency, either independently or in consultation with DGS/ORIM, as necessary for protection of the State.

~~B. Contracts for hazardous activities shall contain the following provisions:~~

- ~~1. The contractor must furnish to the state a certificate of insurance stating that liability insurance of not less than \$1,000,000 per occurrence for bodily injury and property damage liability combined is presently in effect for the contractor.~~
- ~~2. The contractor agrees that the bodily injury liability insurance herein provided for shall be in effect at all times during the term of this contract. In the event said insurance coverage expires at any time or times during the time of this contract, the contractor agrees to provide, at least 30 days before said expiration date, a new certificate of insurance evidencing insurance coverage as provided for herein for not less than the remainder of the term of the contract or for a period of not less than one year. New certificates of insurance are subject to the approval of DGS, and the contractor agrees that no work or services shall be performed prior to such approval. The state may, in addition to any other remedies it may have, terminate this contract on the occurrence of such event.~~

~~C. The certificate of insurance must include the following provisions stating that:~~

- ~~1. The insurer will not cancel the insured's coverage without 30 days prior written notice to the State; and~~
- ~~2. The State of California, its officers, agents, employees, and servants are included as additional insured, but only with respect to work performed for the State of California under this contract.~~

~~Note: DGS/ORIM is available to provide additional consultation on all insurance and liability matters.~~

**7.45 • CONTRACTS WITH NO DOLLAR AMOUNT**

In agreements in which only in kind services are used and in which the performance is other than monetary, the consideration must be valued on a monetary basis for the purpose of determining whether DGS/OLS approval is required.

## 7.50 • AUDITS

(Rev 11/99)

- A. **Audit Requirement:** All contracts for expenditure of public funds in excess of \$10,000 must contain a clause stating that the contract is subject to audit by the State Auditor (GC § 8546.7). All contracts containing participation goals (usually not in contracts under \$10,000) as discussed in SCM 8 must contain an audit clause (CCR § 1896.75). Also, federally funded contracts are often subject to audit in accordance with federal regulations. In addition, the awarding agency has the general responsibility for determining compliance with the terms and conditions of its contracts and may have need of contractual audit authority.
- B. **Records Keeping and Retention:** To facilitate being able to conduct an audit, if needed, the contractor must agree to maintain the records involved with the performance of the contract and to make those records reasonably available for audit. The minimum period of time for retention of contract records is three years after final payment of the contract (GC § 8546.7). In the event of a contract performance or payment dispute, this minimum is extended until
- the dispute is resolved. The awarding agency should not impose a longer records retention requirement or more detailed record keeping requirements unless there is a specific need to do so. If there is a need for longer retention or more detailed records, a clause covering these subjects should be tailored for the contract in a fashion that does not conflict with the clauses below.
- C. **Contract Audit and General Records Keeping Clause:** The following clause meets the above requirements and must be included in all contracts of \$10,000 or more regardless of the form of contract used. This clause should be sufficient to meet most state and federal needs. If your agency has a need for a different standard audit clause, the clause should be submitted to DGS/OLS for review with an explanation as to the necessity of the differences.

“Contractor agrees that the awarding department, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting documentation pertaining to the performance of this Agreement. Contractor agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. Contractor agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. Further, Contractor agrees to include a similar right of the State to audit records and interview staff in any subcontract related to performance of this Agreement (GC 8546.7, PCC 10115 et seq., CCR Title 2, Section 1896).

Contractor shall comply with the above and be aware of the penalties for violations of fraud and for obstruction of investigation as set forth in PCC § 10115.10.”

## 7.55 • DRUG-FREE WORKPLACE ACT OF 1990

(Rev 11/99)

- A. The Drug-Free Workplace Act of 1990 (GC § 8350 et seq.) requires state contractors and grantees to certify that they will provide a drug-free workplace. Contractors and grantees may satisfy this requirement in one of the following ways:
1. Use the Drug-Free Workplace Certification form, STD 21. This form may be in effect for the duration of the contract or for a period up to 36 months as provided for below, or

**(7.55 A. Drug-Free Workplace Act of 1990 – continued)**

2. In lieu of the STD 21, use the following standard language in bid forms and contracts:

**Drug-Free Workplace Certification**

By signing this contract, the contractor or grantee hereby certifies under penalty of perjury under the laws of the State of California that the contractor or grantee will comply with the requirements of the Drug-Free Workplace Act of 1990 (Government Code Section 8350 et seq.) and will provide a drug-free workplace by taking the following actions:

- a. Publish a statement notifying employees that unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited and specifying actions to be taken against employees for violations.
  - b. Establish a Drug-Free Awareness Program to inform employees about:
    - The dangers of drug abuse in the workplace;
    - The person's or organization's policy of maintaining a drug-free workplace;
    - Any available counseling, rehabilitation, and employee assistance programs; and
    - Penalties that may be imposed upon employees for drug abuse violations.
  - c. Every employee who works on the proposed contract will:
    - Receive a copy of the company's drug-free workplace policy statement; and
    - Agree to abide by the terms of the company's statement as a condition of employment on the contract.
3. A purchase or sub-purchase order is a contract subject to the certification requirements of the Drug-Free Workplace Act of 1990. To comply with these requirements, state agencies purchasing commodities using purchase or sub-purchase orders may allow a contractor or grantee (vendor) to file a STD 21 to be in effect for 36 months from the date executed. State agencies may issue a STD 21 for a period up to 36 months in lieu of requiring a STD 21 for each individual state purchase.

If the vendor elects to have the STD 21 on file as provided above, the terms and conditions of the STD 21 shall have the same force, meaning, effect and enforceability as if a certification were separately, specifically, and individually provided for each purchase or grant between the vendor and this state agency.
- B. Any contract or grant may be subject to suspension of payments or termination, or both, and the contractor or grantee may be subject to debarment if the contracting or granting agency determines that:
1. The contractor or grantee made a false certification, or
  2. The contractor or grantee violates the certification by failing to carry out its requirements.

**(7.55 Drug-Free Workplace Act of 1990 – continued)**

- C. The Drug-Free Workplace Act shall not be construed to require any contractor or grantee to ensure that other businesses with which it subcontracts also provide drug-free workplaces.

**7.60 • RENTAL AGREEMENTS**

- A. Unless it has specific statutory authority, a state agency cannot agree to:
1. Indemnify a contractor;
  2. Assume responsibility for matters beyond its control;
  3. Agree to make payments in advance;
  4. Accept any other provision creating a contingent liability against the state; or
  5. Agree to obtain insurance to protect the contractor.
- B. The contract must clearly provide that the state does not have responsibility for loss or damage to the rented equipment arising from causes beyond the control of the state. Any provision obligating the state to return the equipment in good condition, subject to reasonable wear and tear, also must except or exclude loss or damage arising from causes beyond the control of the state. The contract must clearly restrict the state's responsibility for repairs and liability for damage or loss to that made necessary by or resulting from the negligent act or omission of the state or its officers, employees, or agents.
- C. If the state does not elect to maintain the equipment, the contract will place the obligation on the contractor, as lessor, to keep the equipment in good working order and to make all necessary repairs and adjustments without qualification, with a clear right in the state to terminate or cease paying rent should the contractor fail to maintain the equipment properly. For this purpose, the contractor's representatives shall be given full and adequate access to the equipment at reasonable times.
- D. Personal property taxes are not generally reimbursed when leasing equipment. (See SAM § 8736)
- E. For the purpose of determining whether contracts containing renewal options are subject to the approval of DGS, the total cost and term of the rental shall be computed by including the cost and term of all renewal options included in the contract.

**7.61 • PURCHASE OPTIONS**

(Rev 10/98)

- A. To avoid paying hidden interest and carrying charges, the state agency should consider purchasing the equipment outright rather than entering into an "installment purchase" or "rental agreement with option to purchase." Funding problems should be discussed with DOF budget staff.
- B. Approval by DGS of the rental agreement does not include approval for the exercise of the option to purchase. Any exercise of the option and purchase of the equipment must be processed through DGS, Procurement Division, in accordance with the procedures set forth in SAM § 3500, et seq.
- C. Agencies shall not circumvent state purchasing policies through use of contracts containing options to purchase.
- D. Whether an equipment rental transaction, which includes an option to purchase, should be processed in accordance with the SCM or should be processed in accordance with the "Purchases" chapter of SAM § 3500 et seq., is dependent upon the acquisition of title to the equipment.

**(7.61 D. Purchase Options – continued)**

1. If the contract provides for automatic transfer of title to the state upon completion of the so-called “rental” payments, or upon payment of a nominal consideration after completion of such “rental” payment, the transaction would be more in the nature of a “conditional sale” or “installment purchase” rather than a “rental of equipment” and should be processed in accordance with SAM § 3500 et seq.
2. If the rental payments will be the same whether or not the lessor’s offered option to purchase is included in the rental agreement, and the state agency includes the option as an unobjectionable and possibly desirable feature, the contract may be processed in accordance with the SCM.

**7.62 • LEASE/PURCHASE ANALYSIS FOR EQUIPMENT**

- A. A lease/purchase analysis shall be prepared (See SAM § 3700) for each contract to lease equipment where the contract exceeds \$1,000 or the duration of the lease exceeds three months. This requirement does not apply to contracts for equipment rented in accordance with PCC section 10108, from other state agencies, or equipment obtained under a Master Rental Agreement.
- B. A Lease/Purchase Analysis is required as follows:
  1. Dollar amount exceeds \$1,000 or the duration of the lease exceeds three months. A copy of the analysis and the contract or amendment shall be retained by the agency.
  2. Submit a copy of the analysis with the contract or amendment to DGS/OLS for approval when approval is required based on the agency’s delegated approval amount.
- C. If the lease/purchase analysis indicates that it is more economical to purchase, it will be necessary to include a justification explaining how it is in the state’s best interest that the equipment be leased. A lease/purchase analysis based on a “zero” salvage value of the equipment will normally be acceptable only when mechanical useful life and program useful life are the same. When bids are obtained, prices for both leasing and purchasing will be secured to facilitate the making of the analysis.
- D. The director of the requesting department should give prior concurrence to proposals in which the lease/purchase analysis indicates purchase but the requesting unit proposes to lease.

**7.65 • NONDISCRIMINATION PROGRAM****(Rev 10/98)**

- A. All employers who are, or wish to become, contractors with the State must develop and implement a nondiscrimination program as defined in Title 2, CCR Section 8104; unless specifically exempted pursuant to Title 2, CCR Section 8115, which includes contracts under \$5,000 and contracts with licensed Community Based Rehabilitation Program (CRP). See Government Code Sections 12935(a) and 12990(d); and Title 2, CCR Section 8103.
- B. A contractor shall include the nondiscrimination clause in its contracts and with all subcontracts to perform work under the contract, either directly or by incorporation by reference. Any such incorporation by reference shall be specific and prominent. See Title 2, CCR Section 8103; and Government Code Sections 12935(a) and 12990(d).
- C. If there is no statement of compliance with the bid or proposal, the bid is unresponsive.

**(7.65 Nondiscrimination Program – continued)**

- D. Nondiscrimination Certification - Any bid, proposal, or offer for a contract which is submitted by a contractor who has been decertified from contracting with the State by DFEH, shall be deemed to be nonresponsive and shall be rejected. Refer to the California Notice Register for a list of decertified contractors. (Published by the Office of Administrative Law and available through the Office of State Printing.)

**7.70 • RECYCLED PRODUCT CONTENT****(Rev 1/01)**

- A. Effective September 1, 1999, per administrative policy, the following service contracts must contain language requiring the use of recycled products.
1. Janitorial contracts must contain terms requiring the use of janitorial supplies containing recycled paper products only.
  2. Printing contracts must contain terms requiring recycled paper only, unless the proposed printing job cannot be done on recycled paper.
  3. Contracts involving parts cleaning must contain terms requiring the use of recycled solvents.

Contracts included in the above categories, subject to DGS-OLS approval, must contain the required terms or they will not be approved.

- B. In addition, the contractor must agree to certify in writing, upon completion of performance under the agreement, the minimum percentage, or the exact percentage of post-consumer and secondary materials provided, or used in the services provided under the agreement. (PCC § 12205) This certification must be under penalty of perjury.

**7.75 • SPECIALIZED CONTRACT PROVISIONS****(Rev 4/05)****~~A. Commercial Office Moving Services~~**

~~Contracts exceeding \$2,500 with a carrier for commercial office moving services must conform to the requirements contained in SAM § 3810 which provide for such contracts to be with a carrier whose drivers and supporting personnel are operating under current collective bargaining agreements or who are maintaining the prevailing wages, standards, and conditions of employment for its driver and supporting personnel. See Government Code Section 14920. Agencies must include such requirements in Invitations for Bids and contracts.~~

**~~B. Pest Control and Fumigation Contracts~~**

~~Pest control and fumigation contracts must contain the insurance provisions found in SCM 7.40.~~

**~~C. Elevator Maintenance Contracts~~**

~~Contracts for elevator maintenance shall include the following provision:~~

~~Commencement and termination of contract:~~

~~The service to be performed under this contract shall begin on the date specified and continue for a period of five years. The State may terminate this contract at any time by giving the contractor at least thirty (30) days written notice of its intention to do so.~~

## 7.80 • MULTIPLE YEAR CONTRACTS

(Rev 10/05)

- A. Contracts for services should normally not exceed two years, absent a substantial written justification for a longer term, based on business reasons.

Approval by DGS/OLS must be obtained prior to releasing any **RFP or IFB** solicitation that contains for a contract term beyond two years. A justifiable business reason must support such a request for approval. Prior approval for multiple year contracts is not required for:

1. Contracts not subject to OLS review;
2. Use of, or subscription to, Master Service Agreements (MSA);
3. Interagency Agreements (I/A), or

Agencies who wish to get prior approval from OLS should contact the attorney assigned to their department on how to proceed. Failure to obtain prior approval from DGS/OLS may be cause for non-approval of the contract.

If the additional option years are considered in the method for selecting the contractor, an agency will not need to get an NCB exemption when amending the contract to exceed two years so long as all terms, conditions, and costs are those evaluated in the bidding procedure.

- B. Unless an agency has either statutory authority or a written exemption each contract service should be re-bid after a total of thirty-six (36) months consecutive with the same contractor.
- C. For services such as fiscal audit or quality audit, it is desirable to obtain a different contractor after three years.

## 7.85 • CONTRACT TERMINATION CLAUSES

- A. Agencies should carefully consider the types of termination clauses to be used in each contract.
1. **TERMINATION FOR CAUSE.** The preprinted language on the Std. Form or STD 213, and the General Terms and Conditions available on the internet at ([www.dgs.ca.gov/contracts](http://www.dgs.ca.gov/contracts)) are satisfactory for a termination for cause. Agencies should not change or modify this language due to the possibility of accidentally changing a legal requirement.
  2. **TERMINATION WITHOUT CAUSE.** It is recommended that contracts contain a termination clause to allow the state to terminate the contract, without cause, with advance written notice provided to the contractor. Whether or not to provide the same right to the contractor (mutual termination), must be given careful consideration in that considerable effort may have been expended in establishing the contract. It is not recommended that mutual termination, without cause, be included in the contract.

## 7.90 • BREACH OF CONFIDENTIALITY BY CONTRACTOR

(New 3/03)

Per AB 2578, [Chap. 1097, Stats 2002], state agencies shall specifically identify in a consulting contract, or in an IT contract, any information that is considered to be proprietary. During performance of the agreement, the contracting state agency shall provide written notification of information identified as proprietary subsequent to execution of the contract.



## 8. BUSINESS PARTICIPATION PROGRAM REQUIREMENTS

### 8.00 • INTRODUCTION

(Rev 1/01)

This chapter discusses programs established to encourage participation in state contracting by various segments of the business community. One or more of these programs may be involved in a specific contracting opportunity. Agency staff involved with contract preparation should be familiar with these programs such that they can explain the program and contracting agency discretion decisions to bidders. Questions about these programs should be addressed to:

The Department of General Services, Procurement Division (See Table 8.1)

Internet Address: [www.dgs.ca.gov/pd](http://www.dgs.ca.gov/pd)

Offices listed in Table 8.1 can be contacted through the Procurement Division web site.

### 8.01 • TABLE OF CONTENTS

(Rev 3/03)

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## 8.02 • PROCUREMENT DIVISION RESPONSIBILITY AND LEGAL REFERENCES

(Rev 10/05)

Note:-Effective July 1, 2000 the OSBCR became part of the DGS Procurement Division (PD). OSBCR changed its name to OSDC, and narrowed its focus to Small Business and DVBE certification. Other programs previously administered by the OSBCR merged with existing programs within the PD. See Table 8.1 for information.

Table 8.1 indicates responsibilities for various programs.

Table 8.1

Disabled Veteran Business Enterprise (DVBE) Participation Program		
Function or Service	Office/Unit	Authority
Act as a resource. Disseminate policies and procedures.	<del>Small Business &amp; DVBE Outreach &amp; Education Section</del> (916) 375-4400	PCC § 10115 et seq.; 2 CCR §§ 1896.60 - 1896.67; 2 CCR §§ 1896.90 - 1896.98. Military and Veterans Code § 999.7.
Coordinate reporting	<del>Small Business &amp; DVBE Outreach &amp; Education Section</del> (916) 375-4400	PCC § 10115 et seq.; 2 CCR §§ 1896.60 - 1896.67; 2 CCR §§ 1896.90 - 1896.98.
Report Compliance Violations	Office of Small Business & DVBE Certification (OSDC) (916) 375-4940	2 CCR §§ 1896.60 - 1896.67; 2 CCR §§ 1896.90 - 1896.98.
Certification	Office of Small Business & DVBE Certification (OSDC) (916) 375-4940	California Military and Veterans Code § 999 et. seq. PCC § 10115 et seq.; 2 CCR §§ 1896.60 -1896.67; 2 CCR §§ 1896.90 - 1896.98.
Review and approve DVBE Utilization Plans	<del>Small Business &amp; DVBE Outreach &amp; Education Section</del> (916) 375-4400	PCC § 10115.15
Administer the five percent Small Business Preference Small Business issues and questions; Outreach Program	<del>Small Business &amp; DVBE Outreach and Education Section</del> (916) 375-4400	GC § 14835 et seq.; 2 CCR § 1896 et seq.
Certification	<del>Small Business &amp; DVBE Certification (OSDC)</del> (916) 375-4940	<del>GC § 14835 et seq;</del> <del>2 CCR § 1896 et seq.</del>

**(8.02 Procurement Division Responsibility and Legal References – continued)**

Table 8.1 (cont.)

Small Business Advocate Program	<del>Small Business &amp; DVBE Outreach and Education Section</del> (916) 375-4400	GC §§ 14835, 14847
Ensure Prompt Payment to Small Businesses	Purchasing Authority Management Section (916) 375-4351	GC § 927 et seq.
Target Area Contract Preference Act (TACPA)		
Function or Service	Office/Unit	Authority
Administer the program and serve as a resource.	Dispute Resolution & Preference Program Section (916) 375-4609	GC § 4530 et seq.; 2 CCR §§ 1896.30 - 1896.41
Enterprise Zone Act (EZA)		
Function or Service	Office/Unit	Authority
Administer the program and serve as a resource	Dispute/Resolution & Preference Program Section (916) 375-4609	GC § 7080 et seq.
Local Agency Military Base Recovery Area Act (LAMBRA)		
Function or Service	Office/Unit	Authority
Administer the program and serve as a resource	Dispute Resolution & Preference Program Section (916) 375-4609	GC § 7118

## **8.10 • INTRODUCTION TO DISABLED VETERAN BUSINESS ENTERPRISE (DVBE) PARTICIPATION PROGRAM**

**(Rev 1/01)**

California establishes statewide DVBE participation goals by statute based on an awarding agency's overall contract dollars awarded as follows:

	<u>At Least:</u>
Disabled Veteran Business Enterprises (DVBE)	3%

An agency has the discretion to apply these goals to a specific contract, but is expected to meet the goals for the total of its contracting each year. State agencies must report annually the level of participation achieved. Should full participation not be attained, agencies must explain why and identify efforts planned to achieve the goals in the future. See SCM 8.17 for additional reporting information.

## **8.11 • DVBE REGULATIONS**

**(Rev 3/98)**

The law requires each agency to adopt regulations to implement the program. However, to avoid duplication of effort, agencies have the option to adopt the regulations developed by DGS. The summarized policies and procedures presented in this chapter are based on those regulations. If agency personnel have questions or issues to be resolved, they should refer to their agency's regulations or to the DGS regulations as applicable.

## 8.12 • WHEN TO APPLY DVBE GOALS TO A CONTRACT

(Rev 10/05)

- A. Agencies should develop a plan or strategy to ensure goal achievement for their overall departmental contract program.
1. Unless statutorily exempt, all contracts, regardless of amount, are subject to the DVBE requirement. Agencies may waive the requirement for an individual contract, however, agencies are still expected to meet their overall goal attainment at the end of each year. When an agency decides to waive the DVBE requirement, this must be noted in the solicitation.
  2. Awarding agencies have sole discretion to exempt contracts from the DVBE Participation Program requirements. In reviewing contracts, the Department of General Services will rely on the awarding agency's decision to exempt contracts.
  3. Contracts with government agencies, **including public** colleges and universities, and Joint Power Authorities JPAs are exempt from the DVBE Participation requirements.
  4. Standard contract language for DVBE participation requirements can be found at the web site: <http://www.pd.dgs.ca.gov>.

## 8.13 • BIDDERS' RESPONSE TO DVBE REQUIREMENTS IN A SOLICITATION

(Rev 3/03)

### A. General Options

When the DVBE participation requirements have been included in the IFB or RFP, there are three basic ways for bidders to meet the requirements for this program (See SCM 8.10):

1. Achieve the minimum DVBE participation goals.
2. Make and document a "good faith effort" to achieve participation.
3. Submit and have approved a DVBE Utilization Plan. Utilization Plans are administered by DGS Procurement Small Business/DVBE Outreach & Education Section and apply to contracts for goods and information technology.

### B. Meeting Goals

There are two methods of meeting the goals. If a bidder is a:

1. Non-DVBE: Commit to use DVBEs for not less than three percent of the dollar amount of the bid or
2. DVBE: Commit to perform not less than three percent of the dollar amount of the bid with its own forces or in combination with other DVBEs.

Note: A department may require greater or lesser (even zero) goals on an individual contract, so long as this decision is reflected in the IFB/RFP. If the goals are included in the IFB/RFP, they apply to all bidders and they may not be waived after the bids/proposals are received.

### C. Making A Good Faith Effort

The five legally defined "good faith effort" steps and applicable processes are:

1. Contact was made with the awarding agency to identify DVBEs. The contact

**(8.13 C. 1. Bidders' Response to DVBE Requirements in a Solicitation – continued)**

purpose is to identify potential DVBE subcontractors and/or suppliers, not merely to request the bid package. Awarding agency responses may include but are not limited to the following:

- a. A list of DVBEs who have expressed interest in the contract by phone, writing, or bid conference attendance.
  - b. A list of DVBEs who have participated, considered, or represented interest for prior contracts.
  - c. Use of an internal database or directory.
  - d. Referral to other resource or service providers. Including the PD web site: [www.dgs.ca.gov/pd](http://www.dgs.ca.gov/pd)
2. Contact was made with other state and federal agencies, and with local DVBE organizations to identify DVBEs. The contact purpose is to identify potential DVBE subcontractors and/or suppliers. Agency responses may include but are not limited to the following:
- a. Use of an internal database or directory.
  - b. Notices on bulletin boards or in newsletters.
  - c. Sharing of association.
  - d. Referral to other resources or service providers.

Currently, a federal contact is available that allows for compliance with the Step 2 requirement of the good faith effort. The Small Business Administration (SBA) provides an electronic search engine, containing business profiles on nearly 200,000 businesses, including certified and non-certified disabled veteran owned businesses. The electronic search engine, PRO-Net, may be accessed at <http://pronet.sba.gov>

Agencies should be careful to verify that firms identified on PRO-Net are State of California certified DVBEs. Qualifying, non-certified DVBE firms should be encouraged to seek certification.

The SBA requests Internet contact only. A list of potential firms downloaded from PRO-Net will verify that the bidder made contact with the SBA.

3. Advertisements were published in trade papers and papers focusing on DVBEs, unless time limits imposed by the awarding agency did not permit that advertising. This is the only good-faith-effort step that state agencies have discretion to waive. Specific advertising requirements are noted in SCM 8.13.D.
4. Invitations to bid Solicitations were submitted to potential subcontractors identified in steps 1-3. Solicitations must be specific so that a bid reply may be made. Solicitations must also be equal. For example, if bonding assistance is offered to one potential subcontractor, it must be offered to all.
5. Available DVBEs were considered. The bidder must apply the same information and evaluation criteria in considering all responding subcontractors for a specified service. Subcontractors that are selected should be identified according to solicitation requirements. Each selected subcontractor must contribute to the fulfillment of the contract by performing a commercially useful function. If the bidder decides not to select a potential subcontractor, the business reasons for non-selection must be documented and submitted in its bid to the awarding agency.

**(8.13 Bidders' Response to DVBE Requirements in a Solicitation – continued)****D. Program Compliance Clarification****1. Advertising**

- a. Bidders must publish advertisements in trade and focus publications at least 14 calendar days before the date the bid or proposal is due, unless a different time frame is specified in the solicitation.
- b. Typically, advertisements should be specific enough to encourage responses from potential DVBE subcontractors and suppliers and include information such as the following:
  - Identify the awarding department.
  - Identify the solicitation.
  - State the bid opening date.
  - Identify the type of work available for subcontracts or the supplies needed.
  - Request bids or quotes from DVBE subcontractors or suppliers.
  - Specify the geographical area and location in which the work will take place.
  - Identify the focus group or groups needed for participation.

**2. Trade Paper:**

A paper meeting all the following criteria qualifies as a trade paper:

- a. Has a business orientation relating to the trade or industry for which the advertisement is being placed;
- b. Is known and used by the members of the trade or industry;
- c. Primarily offers articles, editorials (if any), and advertisements of business opportunities aimed at the trade or industry; and
- d. Is available within the geographic area for which the advertisement is placed and in which the services are to be performed.

**3. Focus Paper:**

A paper focusing on disabled veteran business enterprises that meets all the following criteria qualifies as a focus paper:

- a. Has an orientation relating to disabled veteran business enterprises;
- b. Is known and used by the members of the disabled veteran business enterprise community;
- c. Primarily offers articles, editorials (if any), and advertisements of business opportunities aimed at disabled veteran business enterprises; and
- a. Is available within the geographic area for which the advertisement is placed and in which the services are to be performed.

Note: Typically, advertisements in at least one trade paper and at least one DVBE focus paper are required. However, the awarding agency has discretion to modify these requirements provided the specific requirements are clearly explained in the solicitation.

**(8.13 Bidders' Response to DVBE Requirements in a Solicitation – continued)****E. Resource Packet**

DGS Procurement Division maintains the Resource Packet that is useful in attaining program compliance. The Resource Packet provides listings of referral organizations (state, federal, and local), trade papers, and focus papers that may be used to identify potential subcontractors and suppliers.

**Note:** The solicitation document must contain one of the following:

1. Procurement Division Resource Packet for trade and focus publications,
2. A list of trade and focus publications specific to the business of the awarding department, or
3. The following paragraph:  
 “In accordance with PCC § 10115.2(b)(3), bidders must advertise in trade and focus publications unless all DVBE goals are satisfied. The Procurement Division publishes a list of trade and focus publications to assist bidders in meeting these contract requirements. To obtain this list, please contact the Procurement Division and request the “Resource Packet”. The Procurement Division may be contacted at: (awarding agency to list current address and telephone number of PD).”

**8.14 • QUALIFYING AS A DVBE****(Rev 10/05)****A. Disabled Veteran Business Enterprise**

1. Disabled Veteran: A veteran of the U.S. military, naval, or air service, with a service-connected disability of ten percent or more, and is a resident of California.
2. Disabled Veteran Business Enterprise: A business concern certified by OSDC as meeting all of the following requirements:
  - a. It is a sole proprietorship at least 51 percent owned by one or more disabled veterans or, in the case of a publicly owned business, at least 51 percent of its stock is owned by one or more disabled veterans; a subsidiary which is wholly owned by a parent corporation, but only if at least 51 percent of the voting stock of the parent corporation is owned by one or more disabled veterans; or a joint venture in which at least 51 percent of the joint venture's management and control and earnings are held by one or more disabled veterans.
  - b. The management and control of the daily business operations are by one or more disabled veterans. The disabled veterans who exercise management and control are not required to be the same disabled veterans as the owners of the business concern.
  - c. It is a sole proprietorship, corporation, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.
  - d. It is a contractor, subcontractor or supplier that performs a “commercially useful function” in providing services or goods that contribute to the fulfillment of the contract requirements. “Commercially useful function” is defined as a person or entity doing all of the following: 1) is responsible for the execution of a distinct element of the work of the contract; 2) carries out the obligation by actually performing, managing or supervising the work involved; 3) performs

**(8.14 A. 2. d. Qualifying as a DVBE – continued)**

work that is normal for its business services and functions; and 4) is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry standards.

- e. It is not a “commercially useful function if the DVBEs role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of DVBE participation. (Military and Veterans Code section 999(e)(2))

Note: The State Treasurer’s Office certifies DVBEs for contracts for professional bond services.

**B. Control**

As applied to “ownership (or management) and control” of DVBE means the DVBE owner(s) and or DVBE manager(s) must demonstrate expertise specifically in the firm’s field of operation in controlling the overall destiny and the day-to-day operations of the firm. Office management, clerical, or other experience unrelated to the firm’s field of operations is not sufficient to establish control. The control is comprised of two parts: Managerial and Operational. For more detail see 2 CCR § 1896.61(f).

**C. Certification**

DVBEs are required to be formally certified by OSDC. DVBEs are asked to include a copy of their OSDC certification letter.

Note: By regulation, DVBEs have until 5:00 p.m. on the bid ~~opening day~~ **due date** to submit a complete certification application. If they are certified they would have DVBE Participation Program eligibility. In this instance, the firm would not have a copy of their OSDC certification letter and should indicate their certification is pending. Verification can then be made by the agency with OSDC.

**8.15 • DVBE BID INFORMATION****(Rev 11/04)**

- A. Once the decision has been made to include the DVBE participation requirements in the contract, detailed DVBE specifications must be included in the IFB/RFP. Most agencies have developed standard DVBE specifications. If an agency does not have such specifications or if there is any question about the sufficiency of the specifications used by the agency, the agency should consult with Procurement or with OSDC.
- B. In evaluating program compliance by the bidder, the awarding agency must review the activities to be performed by any DVBEs proposed to participate in the contract to assure that the DVBE performs a “Commercially useful function” as defined in SCM 8.14 A. 2. (d.)(e.). For equipment rental bids, special rules apply to DVBEs which rent equipment or DVBEs which are found to be “equipment brokers” within the meaning of Military and Veterans Code section 999.2(3)
- C. In evaluating the program compliance by the bidder, the awarding agency must require written evidence of completion of steps 1 through 5 of the good faith effort (SCM 8.13.C), including evidence of advertising, unless waived by the awarding department.
- D. Based on the evaluation, the awarding agency, in its sole discretion, may find that the bidder has complied with the program requirements. If a bidder fails to meet the participation program requirements, the bidder must be deemed non-responsive for purposes of an awarding agency’s evaluation and is not eligible for the contract award.



**(8.15 D. DVBE Bid Information – continued)**

Note: A common mistake bidders make is to state that no subcontractors are needed and that goals are not applicable, offering that all the work can be done by the bidder with its own resources. Bidders should be warned that this is not an option if their bid is to be deemed responsive.

**8.16 • MANAGEMENT OF DVBE CONTRACT REQUIREMENTS****(Rev 11/04)****A. Compliance**

1. The awarding agency shall establish a method of monitoring adherence to the goals. Examples of monitoring methods include:
  - a. Random verification of contacts made, either for federal, state or local organization contacts, or for DVBE solicitations or bid consideration.
  - b. Review of multiple bids submitted by the same vendor to verify independent effort and documentation. Evidence of insincere efforts may include:
    - Repeating unsuccessful contacts rather than trying a new contact.
    - Use of contacts that are out of business.
    - Business solicitations not relevant to the contract.
    - Copying of identical DVBE documentation packages.
  - c. Review of job related bid evaluation criteria and how it was applied to subcontractor/supplier bids.
  - d. Contacting DVBEs listed for participation upon award of contract.
  - e. Post award audits.
2. Awarding agencies must investigate and report program violations as follows to the DGS-OSDC. The OSDC may suspend the violator and will forward the investigative report to the Attorney General for possible action. It is unlawful for a person or firm to:
  - a. Knowingly and with intent to defraud, fraudulently obtain or retain certification as a DVBE.
  - b. Willfully and knowingly make a false statement with the intent to defraud, to influence certification of any entity as a DVBE.
  - c. Willfully and knowingly obstruct an investigation regarding DVBE certification.
  - d. Knowingly and with intent to defraud, obtaining or attempting to obtain public moneys to which the person is not entitled under the DVBE Participation Program.
  - e. Knowingly and with intent to defraud, fraudulently represent DVBE participation in order to obtain or retain a bid preference or state contract.
  - f. Willfully and knowingly make a statement, declaration or other document, which is false as to any material matter.
  - g. Willfully and knowingly aid or assist in the preparation or presentation of a false document.
  - h. Willfully and knowingly fail to file any declaration or notice required by section 999.2.

**(8.16 A. 2. Management of DVBE Contract Requirements – continued)**

- i. Establish or cooperate in the establishment of, or exercise control over, a firm found to have violated the above. Violators are guilty of a misdemeanor and may also be liable for a civil penalty. Additionally, violators shall be suspended from bidding on, or participating as a contractor, subcontractor, or supplier in any state contract or project.

Prior to reporting an alleged violation of PCC § 10115.10 to the DGS-OSDC awarding agencies must investigate the alleged violation and must prepare a written report of their findings. The written report must also include a recommendation for action to be taken commensurate with the awarding agency's findings and must be submitted to the DGS-OSDC within 60 days of notification to the awarding agency of the alleged violation.

- j. For contracts with DVBE goals, agencies should include the following language to assist in verifying compliance:

"Contractor agrees to provide verification, in a form agreed to by the state, that DVBE subcontractor participation under this agreement is in compliance with the goals specified at the time of award of contract, or with any subsequent amendment."

**B. Substitution of Subcontractors**

1. After award of a contract, the successful bidder/contractor must use the DVBE subcontractors and/or suppliers proposed in the bid or proposal to the state unless a substitution is requested. The bidder/contractor must request the substitution in writing to the awarding agency and the awarding agency must approve the substitution in writing prior to commencement of any work by the proposed subcontractor/supplier. At a minimum, the substitution must include:
  - a. A written explanation of the reason for the substitution.
  - b. A written description of the business enterprise to be substituted, including the DVBE certification status of the firm.
  - c. If applicable, the contractor must also include the reason a non-DVBE subcontractor is proposed for use.
  - d. A written notice detailing a clearly defined portion of the work identified both as a task and as a percentage share/dollar amount of the overall contract that the substitution business will perform.
2. The request for substitution of DVBE and the awarding agency's approval or disapproval cannot be used as an excuse for noncompliance with any other provision of law, including, but not limited to, the Subletting and Subcontracting Fair Practices Act (PCC §§ 4100 et seq.) or any other contract requirements relating to substitution of subcontractors.
3. The awarding agency may consent to the substitution of another person or business as a subcontractor in any of the following situations:
  - a. When the subcontractor listed in the bid, after having a reasonable opportunity to do so, fails or refuses to execute a written contract, when that written contract based upon the general terms, conditions, plans and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

**(8.16 B. 3. Management of DVBE Contract Requirements - continued)**

- b. When the listed subcontractor becomes bankrupt or insolvent, or goes out of business.
  - c. When the listed subcontractor fails or refuses to perform his/her subcontract.
  - d. When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor.
  - e. When the prime contractor demonstrated to the awarding agency, or its duly authorized officer, that the name of the subcontractor was listed as a result of an inadvertent clerical error.
  - f. When the listed subcontractor is not licensed pursuant to any applicable licensing requirement of any regulatory agency of the State of California.
  - g. When the awarding agency, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the process of the work.
4. Prior to the approval of the prime contractor's request for substitution, the awarding agency, or its duly authorized officer, must give notice in writing to the listed subcontractor of the prime contractor's request to substitute and the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor.
  5. The listed subcontractor who has been so notified will have five working days within which to submit written objections to the substitution of the awarding authority. Failure to file these written objections will constitute the listed subcontractor's consent to the substitution.
  6. If written objections are filed, the awarding authority shall give at least five working days notice in writing to the listed subcontractor of a hearing by the awarding agency on the prime contractor's request for substitution.

**C. Audit**

The DVBE regulations require inclusion of an audit clause in the contracts sufficient to permit audit for compliance with DVBE requirements. The audit clause contained in SCM 7 meets this requirement.

**8.17 • ANNUAL REPORT OF DVBE PARTICIPATION****(Rev 1/01)****A. Due Date and General Content**

On January 1 of each year, each agency must report to the Governor and the Legislature on the level of participation by DVBEs in contracts for the fiscal year beginning July 1 and ending June 30.

In addition, the report must contain the levels of participation by DVBE for the following categories of contracts:

1. Construction
2. Purchases of materials, supplies, and equipment

**(8.17 A. Annual Report of DVBE Participation – continued)**

3. Professional services
4. All contracts for a dollar amount of less than \$25,000

If the established goals are not being met, the agency shall include in the report the reasons for its inability to achieve the standards and identify the remedial steps it shall take.

**B. Consolidated Statewide Report**

State agencies are also required to report participation to the DGS and the Department of Veteran Affairs by January 1. The DGS compiles statistics on all agencies and submits an annual report to the Governor, Legislature and Department of Veterans Affairs by April 1st (Military and Veterans Code § 999.7).

**8.20 • CERTIFIED SMALL AND MICROBUSINESS PROGRAM**

(Rev 10/05)

**A. Definition**

Small business means a business certified by OSDC in which:

1. The principal office is located in California.
2. The officers are domiciled in California.
3. The business is independently owned and operated.
4. The business, with any affiliates, is not dominant in its field of operation.
5. And either:
  - a. The business, together with any affiliates, has 100 or fewer employees and average annual gross receipts of \$10,000,000 (10 million) or less over the previous three years, or
  - b. The business is a manufacturer with 100 or fewer employees.

**B. Microbusiness means a small business certified by OSDC in which:**

1. The principal office is located in California.
2. The officers are domiciled in California.
3. The business is independently owned and operated.
4. The business, with any affiliates, is not dominant in its field of operation.
5. And either:
  - a. The business, together with any affiliates, has 25 or fewer employees and average annual gross receipts of \$2,500,000 (2.5 million) or less over the previous three years, or
  - b. The business is a manufacturer with 25 or fewer employees.

**C. A certified small business or microbusiness shall provide goods or services that contribute to the fulfillment of the contract requirements by performing a “commercially useful function” defined as follows: 1) is responsible for the execution of a distinct element of the work of the contract; 2), carries out its obligation by actually performing, managing or supervising the work involved; 3, performs work that is normal for its business services and functions; and 4), is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices. A small or microbusiness contractor, subcontractor or supplier is not**

**(8.20 C. Certified Small and Microbusiness Program – continued)**

performing a “commercially useful function” if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of small business or microbusiness participation. (Government Code Section 14837(d)(4))

**D. Eligibility**

A business must be formally certified by OSDC to be considered for the small business or microbusiness preference.

**E. Benefits of Certification**

A certified small business or microbusiness is entitled to claim a five percent preference in bidding on state contracts as explained in SCM 8.21. Certified small business or microbusinesses are also entitled to interest penalties paid by the state for late payment of invoices. The penalties are greater for certified small business or microbusinesses than for non-certified businesses.

**F. Nonprofit Veteran Service Agency Small Business Certification**

**Effective January 1, 2005, nonprofit veteran service agencies (NVSA) can qualify for small business certification through the OSDC if the NVSA meets the requirements of Military and Veterans Code Section 999.50 et seq. Upon certification, an SB/NVSA participating as a prime bidder is eligible for the 5% small business bidding preference if they have submitted a timely, responsive bid and have been determined to be a responsible bidder. An SB/NVSA is not subject to the same standards as other certified small businesses. SB/NVSA standards are identified in Military and Veterans Code Section 999.51(a)(3).**

## 8.21 • SMALL BUSINESS PREFERENCE PROGRAM

(Rev 10/05)

### A. How The Preference Works

1. Certified small businesses or microbusinesses can claim the five percent preference when submitting a bid on a state contract. A non-small business, may receive a preference of five percent if the business commits to subcontract at least twenty-five percent of its net bid price with one or more small businesses or microbusinesses. The five percent preference is used only for computation purposes, to determine the winning bidder and does not alter the amounts of the resulting contract. The value of the preference is limited to \$50,000 when a contract award is based upon award to the lowest compliant bid. A contract awarded on the basis of the five percent preference is awarded to the small business, microbusiness or non-small business for the actual amount of its bid.
2. An example of the method used in determining the successful bidder for an IFB, or the cost component of an RFP Primary follows:

Small Business Preference Program  
8.21 Table

<u>Bidder</u>	<u>Bid Amount</u>	<u>Bid after preference</u>	
One	\$30,750	\$30,750	Claims small business or microbusiness status but is not a certified small business or microbusiness; does not claim small business subcontractor participation
Two	\$28,975	\$28,975	Does not claim to be a small business or microbusiness, and does not claim subcontractor participation
Three	\$29,520	\$29,520	Claims non-small business subcontractor preference and does commit to 25% certified small business or microbusiness participation
Four	\$29,870	\$28,421	Claims small business or microbusiness status and is a certified small business or microbusiness

For evaluation purposes, five percent of the low responsible bid of \$28,975 would be \$1,448.75 ( $\$28,975 \times .05$ ); that amount would be subtracted from the bids of Three and Four for a computed total of \$28,421.75 (\$29,870 less \$1,448.75). The contract would be awarded to bidder Four for \$29,870, as the non-small business subcontractor preference cannot remove an award from a certified small business or microbusiness.

3. The method used in determining the successful bidder for an RFP Secondary follows:
  - a. Calculate the “earned” score for all bidders.
  - b. If the highest scored proposal is from a non-certified small business or microbusiness, then:
    1. Calculate five percent (5%) of the highest responsible bidder’s total score.

**(8.21 A. 3. b. Small Business Preference Program – continued)**

2. Add the amount calculated above to the score of each of the certified small business or microbusinesses. This new amount is the total score.
3. Award of the contract must go to the bidder with the highest point count.
4. An example of applying the small business preference to an RFP Secondary follows:

Bidders (*Indicates certified small business)	A*	B	C*	D
Criteria 1(15 Max. points)	11	14	13	12
Criteria 2 (25 Max. points)	21	21	14	19
Criteria 3 (30 Max. points)	18	15	15	18
Cost (30 Max. points)	29.1	30.0	28.3	29.7
(cost points awarded are based on these bid amounts)	(\$103)	(\$100)	(\$106)	(\$101)
Total “earned” points for each bidder	79.1	80.0	70.3	78.7

Bidder B’s was the highest scored proposal, a non-certified small business or microbusiness. Therefore points must be re-apportioned after application of the five percent calculation of B’s point score. B’s bid received 80.0 points. 5% of 80 is 4. All bids from certified small business or microbusinesses will receive 4 additional points. All bids from eligible non-small businesses will receive 4 additional points.

Point awards prior to preference points	79.1	80.0	70.3	78.7
Preference points	4.0		4.0	
Total final points for each bidder	83.1	80.0	74.3	78.7

The highest scored proposal is now the proposal received from A, a certified small business. The contract award amount will be A’s original bid amount.

**B. Small Business Preference Procedures**

1. Notice of availability of the Small Business Preference Program must be included in all IFBs and RFPs. Agency staff should be familiar with the program in order to clearly explain it to bidders. Firms needing more information should be referred to the OSDC website
2. Bidders claiming the small business preference may be requested, but not required, to submit a copy of their certification approval letter from OSDC with the bid or proposal. Failure to provide a copy of their certification approval letter in their response is not a material deviation. A bidder may claim the preference if the bidder submits a complete application for certification to the OSDC by 5 p.m. on the bid opening due date. Therefore, the awarding agency should check the status of the application with OSDC before awarding the contract. An awarding agency shall evaluate the activities to be performed by any certified small or microbusiness on the proposed contract to assure that the certified small or microbusiness is performing a “commercially useful function as defined in SCM 8.20 C.

**C. Procedures for Tie Bids Between Small Business and DVBE or Microbusiness**

**(8.21 C. Small Business Preference Program – continued)**

In the event of a precise tie between the low responsible bid of a certified small business and the low responsible bid of a certified disabled veteran business enterprise (DVBE), or microbusiness, the contract must be awarded to the DVBE or the microbusiness (GC § 14838 (f))

**8.22 • NON-SMALL BUSINESS PREFERENCE PROGRAM****(New 11/04)**

Revisions to Government Code Section 14838(b)(1)(2) now provide for a non-small business preference.

The preference to a non-small business bidder that commits to small business or microbusiness subcontractor participation of twenty-five percent (25%) of its net bid price shall be five percent (5%) of either the lowest, responsive, responsible bidder's price (IFB) or the highest responsive, responsible bidder's total score (RFP secondary). A non-small business, which qualifies for this preference, may not take an award away from a certified small business. The small business regulations are located at 2 CCR 1896.

**8.23 • PROMPT PAYMENT OF SMALL BUSINESSES****(Rev 4/04)****A. Reason for the Program**

Typically, small business and nonprofit organizations do not have the resources or cash flow to carry the state as an account receivable for an extended period of time. Therefore, to encourage expeditious invoice payment, the law provides for assessment of a penalty for late payments of invoices from contractors, including certified small businesses on all contracts and nonprofit organizations registered with OSDC (contracts less than \$500,000) (GC § 927.6). As part of the implementation of this law, every solicitation should alert the bidder about this program

**B. Description of the Program**

The Prompt Payment Act (GC § 927 et seq.) applies to both small and non-small businesses. (See SCM 7.20) However the penalty calculation differs for small businesses as follows. The penalty is calculated, for certified small businesses and non-profit organizations, at a rate of 0.25 percent of the amount outstanding per calendar day from the required payment date. Agencies must automatically calculate and pay the penalties, without requiring the contractor to submit an invoice for these penalty amounts (GC § 927.6). See SCM 7.20 for required payment times.

Note: The time starts to run when the invoice is first received by the agency, not when it gets to your business or accounting office.

The program encourages small businesses or recognized nonprofit organizations to stamp their invoices to identify the invoices as subject to the penalty if not paid within the specified time. Small business stamps are available from OSDC for a fee. However, the invoices are not to payment of the penalty without any further demand for payment when the invoices are not paid within the prescribed time.

**C. Involvement of DGS Procurement Division (PD)**

PD, Acquisition Quality Assurance Program serves as a resource for state agencies and businesses in the implementation of the prompt payment program. State agencies must be sure that a small business is certified before paying the higher interest penalty and that may



**(8.23 C. Prompt Payment of Small business – continued)**

require contacting PD. The PD does not investigate, arbitrate, or advocate for business firms or state agencies in the resolution of payment disputes.

The Prompt Payment Advocate in PD works with agency Small Business Advocates to provide information about the Act and assistance to contractors who have difficulty resolving payment problems.

Effective January 1, 1999, each state agency, with an annual contracting program of \$100,000 or more, must appoint a State Contracting Small Business Advocate to act as a liaison for small business (GC §14846).

**D. Contracting Consideration**

The subject of prompt payment should be considered during the contracting process to ensure that the contract gives clear and accurate instructions about where invoices are to be sent. Those employees who will be involved in the receipt and approval of the invoices need to be familiar with the program. In addition, when an award is made to a certified small business or microbusiness, the contract office should appropriately flag the copy of the contract sent to the accounting office.

## **8.30 • PROGRAMS STIMULATING BUSINESS AND EMPLOYMENT IN SPECIFIC GEOGRAPHIC AREAS (TACPA, EZA AND LAMBRA)**

**(Rev 3/03)**

**A. Introduction**

The state has three programs designed to stimulate business and employment in geographic areas determined to be economically distressed, with areas of high unemployment. These programs are the Target Area Contract Preference Act (TACPA), the Enterprise Zone Act (EZA) and the Local Agency Military Base Recovery Area Act (LAMBRA). The Procurement Division/Dispute Resolution/Preference Program Section administers these programs and provides resource information about the programs.

**B. Applicability to contracts**

The TACPA, EZA and LAMBRA preferences apply to goods and service contracts that meet specific criteria. The criteria are described in Table 8.2.

Summary of TACPA, EZA and LAMBRA Preferences  
Table 8.2

Criterion	TACPA	EZA	LAMBRA
Contract Amount: The dollar threshold or applicability	\$100,000 or more	Same as for TACPA	Same as TACPA and EZA
Excluded Contracts: Contracts not covered by the program	Construction contracts and contracts with a designated work site	Same as for TACPA	Same as TACPA and EZA

**(8.30 B. Programs Stimulating Business and Employment in Specific Geographic Areas (TACPA, EZA AND LAMBRA) – continued)**

Summary of TACPA, EZA and LAMBRA Preferences  
Table 8.2

Geographic Areas: The work site to be used by the contractor to qualify for the preference must be located within a designated area	Distressed areas as specified by the Office of Planning and Research	Enterprise zones as specified by the Trade and Commerce Agency	Work site(s) must be located in a Local Agency Military Base Recovery Area as specified by Trade and Commerce Agency
Percent Of Work: The percentage of the contracted work (hours in to perform the contract) that the contractor must agree to perform at the qualifying work site	Commodities 50% Services 90%	Same as for TACPA	Goods 50% Services 100%
Company Base: The home base of the company	Must be in California	Same as for TACPA	Same as TACPA and EZA
Work Site Preference: The percentage of preference associated with the work site	5 percent	Same as for TACPA	Same as TACPA and EZA
Work Force Preference: An additional preference of one to four percent available if the contractor agrees to perform the contract with persons with a high risk of unemployment	Depends on percent of work force: Percent % Hired      Preference 5 to 9            1% 10 to 14          2% 15 to 19          3% 20 or more       4%	Same as for TACPA	Same as TACPA and EZA
Preference Limits: The highest preference that can be given	9 percent up to \$50,000	Same as for TACPA	Same as TACPA and EZA
Maximum Combined Preferences: TACPA plus EZA plus LAMBRA plus small business	15% up to \$100,000	Same as for TACPA	Same as TACPA and EZA

**C. Preference Procedures**

TACPA, EZA and LAMBRA preference notices and request forms STD 830, 831, and 832 must be included in all IFBs and RFPs when the estimated cost exceeds \$100,000, unless the work

**(8.30 C. Programs Stimulating Business and Employment in Specific Geographic Areas (TACPA, EZA AND LAMBRA) – continued)**

site is specified in the contract. To receive the preferences, the bidder must complete the forms and certify to perform the contract work as specified. This commitment must be enforced as part of the contract.

Standard contract language for TACPA, EZA and LAMBRA preferences can be found at the Procurement website of <http://www.pd.dgs.ca.gov>